

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

THOMAS RICHEY, as Receiver for )  
WESTON RUTLEDGE FINANCIAL )  
SERVICES, INC., ZAMINDARI )  
CAPITAL, LLC a/k/a LEXINGTON )  
INTERNATIONAL FUND, INC., and )  
OXFORD ADAMS CAPITAL, LLC )

Plaintiff, )

v. )

ZAHRA GHODS, RUSA CAP, INC., )  
UNISOURCE CAP, LLC, DOUBLE )  
GRACE HOLDINGS, LTD, )  
JEFFREY JAMES MAYO PRIEBE, )  
ANTONIO MARIA RUSPOLI, )  
SIMON GULKANIAN, )  
PURYA L. GHRABETI, )  
ESTRELLA DE FUEGO, S. A. )

Defendant. )

Civil Action No.:  
1:08-CV-1364-cc

JURY TRIAL DEMANDED

DEFENDANT JEFFREY JAMES MAYO PRIEBE'S  
MOTION FOR SUMMARY JUDGMENT

Defendant Priebe moves this Court for an Order pursuant to Fed. R. Civ. P. 56(b) and LR 56.1 entering summary judgment in favor of Defendant Priebe on all claims against him, including (1) fraudulent transfer; (2) conversion; (3) federal RICO; (4) Georgia RICO; (5) civil conspiracy; (6) unjust enrichment; (7) money had and

received; (8) punitive damages; and (9) attorneys' fees.

In support of his Motion, Defendant Priebe relies upon all pleadings, depositions (including exhibits), discovery and affidavits that have been or will be filed in this action, the accompanying Brief in Support, and the accompanying Statement of Undisputed Material Facts including exhibits thereto.

WHEREFORE, for the reasons set forth in his Brief and supporting documents, Defendant Priebe respectfully requests that the Court grant his Motion and enter summary judgment in his favor.

Respectfully submitted this the 23rd day of June, 2010.

**LAW OFFICE OF DAVID J. HUNGELING, P.C.**

/s/ David J. Hungeling

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**CERTIFICATE OF SERVICE AND TYPE**

Pursuant to Local Rule 5.1, the undersigned counsel for Defendant JEFFREY JAMES MAYO PRIEBE certifies that the foregoing has been prepared with a font size and point selection (Times New Roman, 14 pt.) which was approved by the Court, and that on this 23rd day of June, 2010, the foregoing “**Defendant Jeffrey James Mayo Priebe’s Motion for Summary Judgment**” was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following counsel of record:

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Plaintiff, )

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JURY TRIAL DEMANDED

BRIEF IN SUPPORT OF DEFENDANT PRIEBE'S  
MOTION FOR SUMMARY JUDGMENT

Plaintiff has asserted nine counts against Defendant Priebe including claims for conversion, RICO and civil conspiracy, which are all premised on the theory that Defendant Priebe received \$5 million of stolen money from Defendant Ghods, who stole the funds from Defendant Gish, who stole from the Receivership

Companies. The Plaintiff alleges that Defendant Priebe and the other Defendants acted in concert and are therefore all *guilty by association*. Yet Plaintiff admits that he has no evidence that Defendant Priebe has any of the Receivership Companies' money. The Plaintiff also has no evidence to support his RICO and civil conspiracy theories. Defendant Priebe asks the Court to find as a matter of law that he is not liable to the Plaintiff for the apparent sins of the other Defendants—none of whom have even bothered to answer the Plaintiff's complaint.

This Court should grant summary judgment to Defendant Priebe on each of Plaintiff's counts against him for the following reasons:

- Count I (fraudulent transfer), Count II (conversion), Count VIII (unjust enrichment), and Count IX (money had and received) fail because Mr. Priebe never received money from a fraudulent transfer.
- Count III (federal RICO) and Count IV (Georgia Rico) fail because there is no predicate act and no enterprise.
- Count VII (civil conspiracy) fails because there are no valid tort claims.
- Count X (punitive damages) and Count XI (attorneys' fees) fail because they are not independent causes of action.

### STATEMENT OF FACTS

Plaintiff is the Receiver of several corporate entities (“Receivership Companies”) that were allegedly involved in a Ponzi scheme.<sup>1</sup> The scheme was primarily executed by Geoffrey A. Gish, who has since been sued by the Securities and Exchange Commission (“SEC”) for selling unregistered securities and making fraudulent misrepresentations.<sup>2</sup> As part of the alleged scheme, the Receivership Companies allegedly transferred over \$9 million to Defendants Zahra Ghods and companies which she owned and controlled, Defendants Rusa Cap, Inc. and Unisource Cap, LLC.<sup>3</sup> Ms. Ghods told Mr. Gish and other investors that her investments were secured by iron ore mines that she claimed to own or control in Mexico.<sup>4</sup> Ms. Ghods has also been sued by the SEC for participating in the fraudulent Ponzi scheme perpetrated by Gish.<sup>5</sup> Ms. Ghods is a named Defendant in this case and a default judgment in the amount of \$12,266,599.36 has been entered against her.<sup>6</sup>

Mr. Priebe met Defendant Ghods through a mutual business contact who

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<sup>1</sup> Complaint ¶ 2-3. [Docket Entry No. 1].

<sup>2</sup> Complaint ¶ 1-2.

<sup>3</sup> Complaint ¶ 9.

<sup>4</sup> Complaint ¶ 49-50.

<sup>5</sup> Complaint ¶ 10.

<sup>6</sup> See Default Judgment. [Docket Entry No. 55].

believed that Defendant Ghods and Mr. Priebe may want to do business together.<sup>7</sup> Defendant Ghods represented that she had been investing in various banking instruments, stock based financing and traded bank notes.<sup>8</sup> Mr. Priebe met Defendant Ruspoli through a mutual friend who wanted Mr. Priebe to become a member of a Catholic religious organization that Mr. Ruspoli headed.<sup>9</sup> Mr. Priebe learned that Mr. Ruspoli was also involved in the garment industry and had strong banking relationships in Italy and Europe.<sup>10</sup>

Mr. Priebe met with Defendants Ruspoli and Defendant Ghods “[b]ecause Mr. Ruspoli had opportunities in the garment industries and also possible acquisitions that needed financing.”<sup>11</sup> Thereafter, Defendant Ghods presented Mr. Priebe and Mr. Ruspoli with several business transactions, all of which later turned out to be fraudulent. For example, Defendant Ghods represented to Mr. Priebe and Mr. Ruspoli that she owned precious gemstones and valuable bonds that could be pledged as collateral to generate cash that could be used for investing.<sup>12</sup> Mr. Ruspoli supposedly had experience using “out-of-the-ordinary assets” as security to

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<sup>7</sup> Deposition of Jeffrey James Mayo Priebe, taken March 19, 2010 (“Priebe depo.”) p. 68:6-13. Relevant pages of Mr. Priebe’s deposition transcript are attached at Ex. 1. Defendant has requested that Plaintiff file the original of transcript with the Court.

<sup>8</sup> Priebe depo. p. 73:4-23.

<sup>9</sup> Priebe depo. p. 48:1-14.

<sup>10</sup> Priebe depo. pp. 55:1-2, 55:24-p.56:1.

<sup>11</sup> Priebe depo. p. 71:15-17.

establish lines of credit.<sup>13</sup> Defendant Ghods also presented Defendant Ruspoli and Mr. Priebe with evidence that she had a \$100 million certificate of deposit that could be used as collateral for financing investments.<sup>14</sup>

Ms. Ghods then approached Mr. Ruspoli and Mr. Priebe with an opportunity to invest cash she had obtained through her iron ore mine in Mexico.<sup>15</sup> Ms. Ghods and Mr. Ruspoli then entered into a Trade Agreement, which Mr. Priebe witnessed.<sup>16</sup> Under the terms of the Trade Agreement, Ms. Ghods was to wire to Mr. Ruspoli \$1 million in cash, which was to be held in a restricted bank account as security for a line of credit, from which investments were to be made.<sup>17</sup> Mr. Priebe did not know that the money was actually coming from someone else, and he had never heard of Mr. Gish or the Receivership Companies at that time.<sup>18</sup>

Ms. Ghods ultimately transferred nearly \$5 million to an account she authorized Mr. Ruspoli to establish in a bank located in San Marino ("Bank Account").<sup>19</sup> Mr. Priebe did not open the Bank Account; it was opened by Mr.

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<sup>12</sup> Priebe depo. p. 56:3-18.

<sup>13</sup> Priebe depo. p. 56:3-6.

<sup>14</sup> Priebe depo. p. 162:4-21.

<sup>15</sup> Priebe depo. pp. 105:15-18, 106:1-10.

<sup>16</sup> See Trade Agreement p. 4, attached hereto at Ex. 6; Priebe depo. p. 104:1.

<sup>17</sup> Ex. 6, p. 2; see also Priebe depo. 105:7-22.

<sup>18</sup> Priebe depo. p. 119:13-15, p. 121, p. 105:23-25 ("Q. Was it your understanding that the money was coming from investors in Georgia? A. No.").

<sup>19</sup> Priebe depo. p. 110:7-24, 132: 6-9; see also Rusa Cap Board of Directors Resolution, attached

Ruspoli before Mr. Priebe ever arrived in Italy and before the Trade Agreement was signed.<sup>20</sup> Mr. Priebe acknowledges that he was a signatory on the Bank Account, but only for a “brief period of time.”<sup>21</sup> Mr. Priebe was only added as a signatory on the account at Ms. Ghod’s request.<sup>22</sup>

Mr. Priebe understood that the Bank Account was a “blocked account,” which meant that funds could be deposited into the account, but that no funds could be withdrawn from the account without Ms. Ghods authorization.<sup>23</sup> Ms. Ghods provided Defendant Ruspoli, not Mr. Priebe, with a board resolution from Rusa Cap, a copy of her passport, and a power of attorney, which authorized *Defendant Ruspoli* to open the Bank Account and provided restrictions on such account.<sup>24</sup> The Power of Attorney specifically stated that:

All funds within Rusa Cap Inc. bank accounts must be held as reserved under block funds where the principal will be secure and released within 10-12 months and returned to Rusa Cap Inc. USA (Wachovia Bank) or only withdraw from the account by presence of Ms. Zahra Ghods as CEO.<sup>25</sup>

Mr. Priebe believed that the Bank Account, to which he was a secondary signatory,

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hereto at Ex. 3; Power of Attorney, attached hereto at Ex. 4.

<sup>20</sup> Priebe depo. p. 110:7-24.

<sup>21</sup> Priebe depo. p. 111:2-3.

<sup>22</sup> Priebe depo. p. 111:21-24.

<sup>23</sup> Priebe depo. p. 112:15-19; *see also* Power of Attorney, attached at Ex. 4.

<sup>24</sup> Priebe depo. p. 114:11-18; *see also* Rusa Cap Board of Directors Resolution, attached hereto at Ex. 3; Power of Attorney, attached hereto at Ex. 4.

was, in fact, a blocked account, and that the funds were protected.<sup>26</sup> Mr. Priebe never had a power of attorney or any other document giving him any power or control over the funds.

All of Defendant Ghod's purported assets and business opportunities were later discovered to be fraudulent.<sup>27</sup> After this discovery, Mr. Ruspoli filed a lawsuit against Defendant Ghods in Italy seeking recovery for damage she caused to Mr. Ruspoli's business reputation and standing within the European banking community.<sup>28</sup> Specifically, Mr. Ruspoli claims that he has been damaged because of his involvement with Defendant Ghods' fraudulent activities.<sup>29</sup> Apparently, Mr. Ruspoli maintains that he has no obligation to return the funds to Ms. Ghods because of the damages she caused him.<sup>30</sup>

The Receiver may have good reason for suing Ms. Ghods, Mr. Gish, and Mr. Ruspoli to recover the \$5 million wired to the Bank Account. But Plaintiff has no basis to hold Defendant Priebe liable for these individuals' apparent misconduct.

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<sup>25</sup> Ex. 4.

<sup>26</sup> Priebe depo. p. 112:15-19.

<sup>27</sup> Priebe depo. pp. 167:11-12, 86:12-17, 90:9-12.

<sup>28</sup> Priebe depo. pp. 89:11-14; *see also* Certificate of Action (original in Italian with English translation), attached hereto at Ex. 5.

<sup>29</sup> Ex. 5 at p. 3 (noting "his wholly involuntary involvement in the events alleged has caused [Mr. Ruspoli] conspicuous moral damage and damage to his image. . .").

<sup>30</sup> Priebe depo. p. 179:14-p.180:1; p. 193:3-p.194-25.

Mr. Priebe did not transfer the funds out of the Bank Account.<sup>31</sup> Mr. Ruspoli never told Mr. Priebe that the funds had been transferred out of the account.<sup>32</sup> Mr. Priebe never conducted any business on the account,<sup>33</sup> never directly received an account statement,<sup>34</sup> and does not know where the funds are now.<sup>35</sup> Mr. Priebe testified:

I didn't have any power to go into the bank. I never requested any information from the bank. I never transacted any business at that bank on Rusa Cap or any account.<sup>36</sup>

Moreover, The Receiver has *no evidence* to contradict Mr. Priebe's unequivocal testimony. Rather, the Receiver testified:

I don't know, speaking of my own knowledge, of Mr. Priebe's withdrawing any funds.<sup>37</sup>

\* \* \*

Q: Do you have any documents from the bank, copies of any checkbooks, or anything that would show that Mr. Priebe actually could have exercised authority and withdrawn funds from the account?

A: No.<sup>38</sup>

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<sup>31</sup> Priebe depo. p. 171:15-17.

<sup>32</sup> Priebe depo. p. 171:11-14.

<sup>33</sup> Priebe depo. p. 172:2-3.

<sup>34</sup> Priebe depo. p. 172:24-25.

<sup>35</sup> Priebe depo. p. 171:18-19.

<sup>36</sup> Priebe depo. p. 181:19-22.

<sup>37</sup> Deposition of Receiver Thomas S. Richey, taken March 22, 2010 ("Richey depo.") p. 71:6-8. Relevant pages of Mr. Richey's deposition transcript are attached at Ex. 2. The original of transcript will be filed with the Court as soon as it is sent to the undersigned counsel.

<sup>38</sup> Richey depo. p. 73:6-13.

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I don't know that I do have any evidence that Mr. Priebe – I don't know of any evidence that Mr. Priebe is currently holding any property that belongs to the receivership companies.<sup>39</sup>

\* \* \*

Q: And you do not have any evidence that Mr. Priebe transferred funds out of the San Marino account; correct?

A: We don't have any evidence who did it.<sup>40</sup>

Notably, Mr. Ruspoli also admitted in a statement that he was solely responsible for the funds in the Bank Account, that Mr. Priebe did not have authority over the Bank Account, and that Mr. Priebe has not and will not receive any benefit from the disposition of those funds.<sup>41</sup>

The Receiver now seeks to hold Mr. Priebe liable for vague allegations of impropriety which somehow connect back to the Receivership Companies. However, Plaintiff has no evidence that Mr. Priebe defrauded the Receivership Companies (or their investors) or that he withdrew funds from the Bank Account.<sup>42</sup> Plaintiff has no documents from the bank, copies of any checkbooks, or any other documents that would show that Mr. Priebe actually could have exercised authority

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<sup>39</sup> Richey depo. p. 83:8-12.

<sup>40</sup> Richey depo. p. 84:4-8.

<sup>41</sup> See Statement of Antonio Ruspoli, June 29, 2006, and related letter and other documents, attached hereto at Ex. 7.

<sup>42</sup> Richey depo. p. 71:6-8.

and withdrawn funds from the account.<sup>43</sup> Plaintiff has no evidence that Mr. Priebe is currently holding any property that belongs to the Receivership Companies.<sup>44</sup>

## ARGUMENT AND CITATION TO AUTHORITY

### I. Legal Standard.

Summary judgment should be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”<sup>45</sup> There is “no genuine issue as to any material fact” when the party who bears the burden of proof at trial fails to make a showing sufficient to establish the existence of *any* element essential to that party's case.<sup>46</sup> The Court should construe all the evidence, and draw all logical inferences from that evidence, in the light most favorable to Plaintiff.<sup>47</sup> But drawing all logical inferences in Plaintiff's favor does not mean blindly accepting any inference Plaintiff suggests. “A mere ‘scintilla’ of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could

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<sup>43</sup> Richey depo. p. 73:6-13.

<sup>44</sup> Richey depo. p. 83:8-12.

<sup>45</sup> Fed. R. Civ. P. 56(c).

<sup>46</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (emphasis added).

<sup>47</sup> *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

reasonably find for that party.”<sup>48</sup> Because there is no material fact in dispute regarding the claims asserted against Mr. Priebe, he is entitled to summary judgment.

The testimony and evidence developed in this case shows that Mr. Priebe never received any funds from Plaintiff, has received no benefit from a fraudulent transaction, and does not have access to the funds at issue in this lawsuit. Accordingly, a trial on these issues is unnecessary, and this Court should grant Mr. Priebe’s motion for summary judgment.

**II. Counts I, II, VIII, and IX Fail Because Mr. Priebe Never Received Any Funds From Ghods.**

**A. Count I: Fraudulent Transfer.**

Georgia’s Fraudulent Transfers Act (“UFTA”) prohibits fraudulent transfers of assets.<sup>49</sup> “Typically, a fraudulent transfer claim is made by a creditor who seeks to recover property that was wrongfully transferred by the debtor in an attempt to avoid paying the debt.”<sup>50</sup> A transfer is considered fraudulent “if the debtor made

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<sup>48</sup> *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990); *Ellis v. England*, 432 F.3d 1321, 1327 (11th Cir. 2005) (affirming the district court’s grant of summary judgment because plaintiff “relie[d] entirely on unsupported, conclusory statements not based on personal knowledge”); *see also Monticello v. Winnebago Indus., Inc.*, 369 F. Supp. 2d 1350, 1361 (N.D. Ga. 2005) (“Mere conclusory allegations and assertions are insufficient to create a disputed issue of material facts.”).

<sup>49</sup> O.C.G.A. §§ 18-2-70 *et. seq.*

<sup>50</sup> *Kipperman v. Onex Corp.*, 411 B.R. 805, 826 (Bankr. N.D. Ga. 2009).

the transfer or incurred the obligation (1) [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor; or (2) [w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation...”<sup>51</sup>

A party seeking to set aside a conveyance under the UFTA “bears the burden of proving the elements of its state law fraudulent transfer claim by a preponderance of the evidence.”<sup>52</sup> Under the UFTA, a judgment for the value of the asset transferred may be entered against “(1) [t]he first transferee of the asset or the person for whose benefit the transfer was made; or (2) [a]ny subsequent transferee other than a good faith transferee or obligee who took for value or from any subsequent transferee or obligee.”<sup>53</sup>

Here, the sole allegation regarding Mr. Priebe’s so-called involvement in a fraudulent transfer is that “Ms. Ghods transferred, or directed the transfer of, \$4,992,000 to a San Marino Rusa Cap account under the control of Priebe and Ruspoli.”<sup>54</sup> However, Mr. Priebe was never a transferee of these funds, which is a required element for liability to attach under the UFTA.

Mr. Priebe never received the funds, never had access to the funds at any time in the past, does not have the funds today, and does not know where the funds

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<sup>51</sup> O.C.G.A. § 18-2-74(a).

<sup>52</sup> *In re Barber*, 318 B.R. 921, 923 (Bankr. M.D. Ga. 2004).

<sup>53</sup> O.C.G.A. § 18-2-78(b)(1)-(2).

are. Mr. Priebe did not open the Bank Account; it was opened by Mr. Ruspoli before Mr. Priebe ever arrived in Italy and before the Trade Agreement was signed.<sup>55</sup> Although Mr. Priebe was a signatory to the account for a brief period of time,<sup>56</sup> he testified in his deposition that he “never conducted any business on the account.”<sup>57</sup> He never directly received an account statement.<sup>58</sup> He further testified as follows:

Q: Did Mr. Ruspoli ever tell you that the funds had been transferred out of the San Marino account?

A: No.

Q: Did you ever transfer the funds out of the San Marino account?

A: No.<sup>59</sup>

Plaintiff has no evidence otherwise. In fact, the Receiver does not know much about Mr. Priebe’s involvement in the case at all. In his deposition, the Receiver noted that he had no evidence of Mr. Priebe withdrawing funds from the Bank Account,<sup>60</sup> and no evidence that Mr. Priebe had the authority to withdraw

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<sup>54</sup> Complaint ¶ 184.

<sup>55</sup> Priebe depo. p. 110:7-24.

<sup>56</sup> Priebe depo. p. 111:2-3.

<sup>57</sup> Priebe depo. p. 172:2-3.

<sup>58</sup> Priebe depo. p. 172:24-25.

<sup>59</sup> Priebe depo. p. 171:11-17.

<sup>60</sup> Richey depo. p. 71:6-8.

funds.<sup>61</sup> Nor does the Receiver have any evidence that Mr. Priebe is currently holding property of the receivership companies.<sup>62</sup>

Because Plaintiff has *no evidence* that Mr. Priebe received any money from the receivership companies, he cannot be held liable for a fraudulent transfer. Further, there is no evidence of intent as required by the UFTA. For these reasons, this Court should grant summary judgment in favor of Mr. Priebe on Count I of Plaintiff's Complaint.

**B. Count II: Conversion.**

To make a prima facie case of conversion under Georgia law, a plaintiff must prove the following five elements of the tort: (1) proof of ownership or title in the plaintiff to the disputed property, or the plaintiff's right to immediate possession of the property; (2) *actual possession of the property by the defendant*; (3) demand by the plaintiff for the return of the property; (4) the defendant's refusal to return the property; and (5) the value of the property.<sup>63</sup>

As discussed in part I, *supra*, there is no evidence that Mr. Priebe (1) received any of the receivership funds or (2) had or has actual possession of those

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<sup>61</sup> Richey depo. p. 73:6-13.

<sup>62</sup> Richey depo. p. 83:8-12.

<sup>63</sup> *Eleison Composites, LLC v. Wachovia Bank, N.A.*, 267 Fed. Appx. 918, 923 (11th Cir. 2008) (emphasis supplied).

funds.<sup>64</sup> Because there is no evidence of possession, which is the second element of conversion under Georgia law, Plaintiff's Count II for conversion must fail.

**C. Count VIII: Unjust Enrichment.**

“Unjust enrichment applies when as a matter of fact there is no legal contract. . . , but when the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for.”<sup>65</sup>

As laid out in detail in part I, *supra*, Mr. Priebe has received no benefit from Plaintiff. The Receiver acknowledged that he does not have evidence that Mr. Priebe was unjustly enriched in his deposition:

Q: . . . [H]ow do you contend that Mr. Priebe has been unjustly enriched by the receivership companies?

A: Well, all I can say is that he had access to the money. The money is gone. Either Mr. Priebe and/or Mr. Ruspoli took the money. If he didn't personally get unjustly enriched, he's liable for Mr. Ruspoli's unjust enrichment given the reasons that I've provided before.<sup>66</sup>

Again, the Receiver's opinion that Mr. Priebe is liable for unjust enrichment whether or not he received a benefit is untenable under Georgia law. Because there

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<sup>64</sup> Richey depo. pp. 71:6-8, 73:6-13, 83:8-12.

<sup>65</sup> *Engram v. Engram*, 265 Ga. 804, 807 (1995) (citing *Smith v. McClung*, 215 Ga. App. 786, 789(3) (1994)).

<sup>66</sup> Richey depo. p. 96:13-22.

is no evidence to support an essential element of a claim for unjust enrichment against Mr. Priebe, summary judgment on this claim is proper.<sup>67</sup>

**D. Count IX: Money Had And Received.**

A claim for money had and received is comprised of the following elements: “a person has received money of the other that in equity and good conscience he should not be permitted to keep; demand for repayment has been made; and the demand was refused.”<sup>68</sup>

For the same reasons that the conversion and unjust enrichment claims fail, this claim fails. Mr. Priebe has not received money from Plaintiff, he has not kept it, and he is not refusing to repay it because he does not have it. Therefore, Count IX fails as a matter of law.

**III. Plaintiff’s RICO Claims Fail Because There Is No Predicate Act And No Enterprise.**

**A. Count III: Federal RICO.**

“The four elements of civil RICO liability are (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.”<sup>69</sup> “Plaintiffs in such an action must identify and prove a pattern of racketeering activity, defined as two

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<sup>67</sup> See *Engram*, 265 Ga. at 807 (affirming summary judgment due to absence of evidence to support an essential element of unjust enrichment).

<sup>68</sup> *Fernandez v. WebSingularity, Inc.*, 299 Ga. App. 11, 13 (2009).

<sup>69</sup> *Langford v. Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1311 (11th Cir. 2000).

‘predicate acts’ of racketeering activity within a 10-year period.”<sup>70</sup> “The phrase ‘racketeering activity’ is defined as including any act which is indictable under a lengthy list of criminal offenses, including the federal statutes prohibiting mail and wire fraud.”<sup>71</sup> Here, Plaintiff cannot establish the required predicate acts or Mr. Priebe’s involvement in an “enterprise” in order for RICO to apply.

i. **Plaintiff Cannot Establish The Required Predicate Acts.**

Plaintiff apparently alleges the wire transfers to the San Marino account were a predicate act under RICO.<sup>72</sup> “A plaintiff must prove the following elements to establish liability under the federal mail and wire fraud statutes: (1) that defendants knowingly devised or participated in a scheme to defraud plaintiffs, (2) that they did so willingly with an intent to defraud, and (3) that the defendants used the U.S. mails or the interstate wires for the purpose of executing the scheme.”<sup>73</sup>

None of these elements have been met. Plaintiff vaguely alleges that “defendants made multiple fraudulent misrepresentations and omissions of fact to the Receivership Companies and their investors for purposes of defrauding them.”<sup>74</sup> However, Mr. Priebe had no written or oral communication with the Receivership

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<sup>70</sup> *Id.* at 1311-12 (citing 18 U.S.C. § 1961(5)).

<sup>71</sup> *Id.* at 1312.

<sup>72</sup> Richey depo. p. 90:18-21; Complaint ¶¶ 214-216.

<sup>73</sup> *Langford*, 231 F.3d at 1312.

Companies at all; Mr. Priebe did not know who Geoff Gish was.<sup>75</sup> Mr. Priebe did not know the names of the people in Georgia who had invested money through Ms. Ghods.<sup>76</sup> Mr. Priebe did not, and could not have, “knowingly devise or participate in a scheme to defraud plaintiff” when he did not even know who the receivership companies were and had no communication with them.

Plaintiff cannot establish a single claim for mail or wire fraud against Mr. Priebe, not to mention a pattern of mail or wire fraud. “To establish a pattern there must be a showing of more than one racketeering activity and the threat of continuing activity.”<sup>77</sup> Plaintiff has shown neither a pattern of past activity nor a threat of continuing mail or wire fraud. Mr. Priebe did not open the Bank Account,<sup>78</sup> and he did not transact any business at the bank.<sup>79</sup> Plaintiff also fails to prove that his alleged injuries directly flowed from any predicate act committed by Mr. Priebe.<sup>80</sup> Plaintiff’s RICO claim, therefore, fails because Plaintiff lacks any proof of a predicate act (mail or wire fraud) by Priebe.

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<sup>74</sup> Complaint ¶ 217.

<sup>75</sup> Priebe depo. p. 119:13-14.

<sup>76</sup> Priebe depo. p. 105:23-25.

<sup>77</sup> *Antilles Trading Co., S.A. v. Scientific-Atlanta, Inc.*, 117 F.R.D. 447, 449 (N.D. Ga. 1986).

<sup>78</sup> Priebe depo. p. 110:7-24.

<sup>79</sup> Priebe depo. p. 181:21-22.

<sup>80</sup> See 18 U.S.C. § 1961(5); *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1307 (11th Cir. 2003)(stating that a plaintiff alleging a civil RICO claim must show a “direct relation between the injury asserted and the injurious conduct alleged.”); *Bivens Gardens*

ii. **Mr. Priebe Did Not Participate In A RICO Enterprise.**

Plaintiff alleges that Rusa Cap was an “enterprise” for the purposes of RICO.<sup>81</sup> Alternatively, Plaintiff alleges that “Defendants formed an association-in-fact for the purpose of fraudulently obtaining funds from the Receivership Companies” which was an “enterprise” within the meaning of the federal RICO statute.<sup>82</sup>

However, there is simply no evidence to support these conclusory allegations. In the Receiver’s deposition, he was asked “In your RICO allegation, do you contend that Mr. Priebe was somehow part of a RICO enterprise that included Mr. Gulkanian . . . ?”<sup>83</sup> In part of a vague answer to that direct question, the Receiver concluded that “[t]here are definitely connections there.”<sup>84</sup> He further stated “I’m not sure how much more there is to it than that. We can look to find out, but I haven’t an answer to it as the Receiver. I personally do not have an answer beyond that at this time.”<sup>85</sup>

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*Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir. 1998) (“the test for RICO standing is whether the alleged injury was directly caused by the RICO violation.”).

<sup>81</sup> Complaint ¶ 211.

<sup>82</sup> Complaint ¶ 212.

<sup>83</sup> Richey depo. p. 93:9-11.

<sup>84</sup> Richey depo. p. 94:7-8.

<sup>85</sup> Richey depo. pp. 94:15-19.

The Receiver's opinion that "[t]here are definitely connections there,"<sup>86</sup> is, without more, insufficient to establish that Mr. Priebe played any part in a RICO enterprise. Filing suit against a defendant based on fraudulent transfer and RICO and then offering to "look to find out" more information is contrary to the purpose of the RICO statute. This Court has previously noted that:

a vague allegation of fraud made with the hope of later discovery of the wrongdoing is even more troubling in the context of a RICO claim, in which the defendant stands accused of racketeering. A complaint alleging fraud and racketeering 'should be a vehicle to right a wrong, not to find one.'<sup>87</sup>

The lack of any facts to support these essential elements is fatal to Plaintiff's RICO claim. Accordingly, this court should grant Mr. Priebe's Motion for Summary Judgment on Plaintiff's Count III.

**B. Count IV: Georgia RICO.**

A claim under Georgia's civil RICO statute requires a demonstration of a "pattern of racketeering activity" along with a "direct causal connection between [the] injury and the commission of the predicate acts."<sup>88</sup> Plaintiff's Georgia RICO claim fails for the same reasons that his federal RICO claim fails: Plaintiff cannot

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<sup>86</sup> Richey depo. p. 94:7-8.

<sup>87</sup> *Antilles Trading Co.*, 117 F.R.D. at 450.

<sup>88</sup> *Brown v. Moe's Southwest Grill, LLC*, Case No. 1:07-CV-0741-RWS, 2009 U.S. Dist. LEXIS 119775 \*8 (N.D. Ga. Dec. 21, 2009) (citing O.C.G.A. §§ 16-14-4, 16-14-3(2) and *Marshall v. City of Atlanta*, 195 B.R. 156, 167 (Bankr. N.D. Ga. 1996)).

establish the required predicate acts.<sup>89</sup> For these reasons, this Court should grant summary judgment in favor of Mr. Priebe on Plaintiff's Count IV.

**IV. Plaintiff's Civil Conspiracy Claim Count VII Fails Because There Are No Valid Tort Claims.**

Georgia law is clear that a civil conspiracy claim is only stated where there is an underlying tort.<sup>90</sup> Because Plaintiff's claims for the underlying torts of fraudulent transfer, conversion, federal RICO claims, Georgia RICO claims, unjust enrichment, and money had and received fail, so does Plaintiff's conspiracy claim against Mr. Priebe.

**V. Plaintiff's Claims For Punitive Damages And Attorneys' Fees, Counts X And XI, Fail Because They Are Not Independent Causes Of Action.**

**A. Count X: Punitive Damages.**

There is no independent cause of action for punitive damages.<sup>91</sup> Therefore, if all other counts fail, Plaintiff's punitive damages claim fails as well. Even if any other counts remain, Plaintiff cannot establish the requirements under Georgia law

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<sup>89</sup> See *Avery v. Chrysler Motors Corp.*, 214 Ga. App. 602, 604 (1994) (stating that a RICO claim fails if plaintiff cannot demonstrate the occurrence of the predicate act); see also *Marshall v. City of Atlanta*, 195 B.R. 156, 179 (Bankr. N.D. Ga. 1996).

<sup>90</sup> *Johnson v. Ellington*, 196 Ga. 846, 846 (1943); *Premier/Ga. Mgmt. Co. v. Realty Mgmt. Corp.*, 272 Ga. App. 780, 788 (2005) ("Absent the underlying tort, there can be no liability for civil conspiracy."); *Miller v. Lomax*, 266 Ga. App. 93, 103 (2004) (same); *Strange v. Hous. Auth. of Summerville*, 268 Ga. App. 403, 410 (2004) (affirming summary judgment for defendant on

governing punitive damages. “Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequences.”<sup>92</sup> Plaintiff has not and cannot prove that Mr. Priebe engaged in any tortious conduct, let alone conduct which would raise the presumption of conscious indifference to the consequences.

**B. Count XI: Attorneys’ Fees.**

There is no independent cause of action for attorneys’ fees and costs.<sup>93</sup> Moreover, Plaintiff cannot satisfy the requirements for attorneys’ fees under O.C.G.A. § 13-6-11 because Mr. Priebe has neither “acted in bad faith, . . . been stubbornly litigious, [n]or caused [Plaintiff] unnecessary trouble and expense.” Plaintiff cannot provide any evidence that Mr. Priebe “acted through ill will or furtive design.”<sup>94</sup> Accordingly, there is no basis for Mr. Priebe to be held accountable for Plaintiff’s attorneys’ fees.

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plaintiff’s conspiracy claim in the absence of an underlying tort); *R. W. Holdeo, Inc. v. Johnson*, 267 Ga. App. 859, 867 (2004) (conspiracy alone provides no cause of action).

<sup>91</sup> *Byrne v. Nezhat*, 261 F.3d 1075, 1093 n.34 (2001).

<sup>92</sup> O.C.G.A. § 51-12-5.1(b).

<sup>93</sup> *See Brown v. Baker*, 197 Ga. App. 466, 467 (1990) (“O.C.G.A. § 13-6-11 does not create an independent cause of action.”).

<sup>94</sup> *See Williams Tile & Marble Co. v. Ra-Lin & Assocs., Inc.*, 206 Ga. App. 750, 752 (1992); *see*

**CONCLUSION**

While it may be true that the Receivership Companies lost money based on fraudulent activities, there is simply no evidence that Mr. Priebe had any involvement or is liable in any way to Plaintiff. The alleged connection between Plaintiff and Mr. Priebe is attenuated at best. Plaintiff has no evidence that shows Mr. Priebe ever spoke to anyone involved with the Receivership Companies, let alone intentionally defrauded them. The record in this case fails to establish the essential elements of Plaintiff's claims as a matter of law, and thus, Mr. Priebe is entitled to summary judgment.

WHEREFORE, Mr. Priebe respectfully requests that this Court grant his Motion for Summary Judgment.

Respectfully submitted this the 23rd day of June, 2010.

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*also Demido v. Wilson*, 261 Ga. App. 165, 169 (2003) (granting summary judgment denying recovery of punitive damages, attorneys' fees and expenses.).

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**CERTIFICATE OF SERVICE AND TYPE**

Pursuant to Local Rule 5.1, the undersigned counsel for Defendant JEFFREY JAMES MAYO PRIEBE certifies that the foregoing has been prepared with a font size and point selection (Times New Roman, 14 pt.) which was approved by the Court, and that on this 23rd day of June, 2010, the foregoing “**Brief in Support of Defendant Jeffrey James Mayo Priebe’s Motion for Summary Judgment**” was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following counsel of record:

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